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IN THE

Supreme Court of the United States

October Term, 1951

No. 718

JEROME DWORSKY, ZOLLIE DWORSKY, PETER DWORSKY and HARRY DWORSKY, Individually and as Co-partners, Doing Business as NORTH UNION CO., GRACE B. WRIGHT, LOUIS SACHS, JOSEPH L. NATHANSON and CARL K. LIFSON, Petitioners,

vs.

C. E. WARNER, as Trustee in Bankruptcy of HYMAN COHEN, an Individual, Doing Business as AMERICAN FOOTWEAR CO., Bankrupt, Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

MELVIN H. SIEGEL,
1036 Andrus Building,
Minneapolis, Minnesota,
Counsel for Petitioners.

Of Counsel:
LEONARD, STREET & DEINARD,
1036 Andrus Building,
Minneapolis, Minnesota.

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INDEX

	Page
Opinions below	2
Jurisdiction	2
Question presented	3
Statutes involved	3
Statement of the case	4
Specification of errors to be urged	6
Reasons for granting the writ	6
Conclusion	15

AUTHORITIES CITED

CASES:

Armstrong's Administrator v. Sumne & Ratterman Co., 211 Ky. 750, 278 S. W. 111	10
Crenshaw v. McKinley (C. A. 2), 116 F. (2d) 877	14
Emil v. Hanley, 318 U. S. 515	8, 9, 12, 13
Ex parte Collett, 337 U. S. 55	12
Fox v. Summit King Mines (C. A. 9), 143 F. (2d) 926	10
Gregory v. United States, 17 Blatchf. 325	10
Harris v. First National Bank, 216 U. S. 382	7
Mayer v. Hellman, 1 Otto 496	14
Park v. Cameron, 237 U. S. 616	7, 9
Pirie v. Chicago Title & Trust Co., 182 U. S. 438	14
Schwegmann v. Calvert Distillers Corp., 341 U. S. 384	12
Siegel v. Municipal Capital Corp. (C. A. 2), 102 F. (2d) 905	7, 9
United States v. National City Lines, 337 U. S. 78	12
Waite v. Gottstein (D. C. Wash.), 224 F. 281	7, 9
Wilson v. Nelson, 183 U. S. 191	6, 10

STATUTES:

Act of June 22, 1938 (Chandler Act), c. 575, Section 70e, 52 Stat. 882 (11 U. S. C. 1946 ed., Section 110e)	2, 5
Bankruptcy Act of 1898, c. 541, Sec. 70e, 30 Stat. 566, as amended by Act of Feb. 5, 1903, c. 487, Sec. 16, 32 Stat. 800 (11 U. S. C. 1934 ed., Section 110e)	3

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H. Rept. No. 1409, 75th Cong., 1st Sess., pp. 2, 3, 5, 32, 34, 35.....8, 11, 13, 14
S. Rept. No. 1916, 75th Cong., 3rd Sess., p. 17..... 8

TEXTS:

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2 Collier on Bankruptcy (14th ed.), Sec. 23.15, pp. 581-582 9
4 Collier on Bankruptcy (14th ed.), Sec. 70.38, p. 1194 14
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Page 158..... 14
Pages 162-163..... 8

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McLaughlin, James A., Aspects of The Chandler Bill to Amend The Bankruptcy Act, 4 U. of Chi. L. Rev. 384-388 (April, 1937) 8
Oldham, D. M., Chandler Amendment to The National Bankruptcy Act, 17 Tex. L. Rev. 329-334 (April, 1939) 9
Oldham, D. M., Plenary, Summary and Concurrent Jurisdiction Under The Chandler Act, 15 J. N. A. Ref. Bank. 42-44 (Oct., 1940) 9
Parker, G. W., The Chandler Act as to Changes Effected, 45 Com. L. J. 469 (Jan., 1940) 9
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No. ———

JEROME DWORSKY, ZOLLIE DWORSKY, PETER DWORSKY and HARRY DWORSKY, Individually and as Co-partners, Doing Business as NORTH UNION CO., GRACE B. WRIGHT, LOUIS SACHS, JOSEPH L. NATHANSON and CARL K. LIFSON, Petitioners,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To The Hon. Chief Justice and Associate Justices of The Supreme Court of The United States:

Your petitioners, Jerome Dworsky, Zollie Dworsky, Peter Dworsky, Harry Dworsky, Grace B. Wright, Louis Sachs, Joseph L. Nathanson and Carl K. Lifson, respectfully pray for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled case on January 29,

1952, and in support thereof respectfully show to the court:

OPINIONS BELOW

The opinion of the District Court (R. 22-28) is reported at 98 F. Supp. 466. The opinion of the court below (R. 32-39) is reported at 194 F. (2d) 277.

JURISDICTION

The judgment of the court below was entered on January 29, 1952 (R. 40). The jurisdiction of this Court is invoked under Section 47c of Title 11 U. S. C. and under Sections 1254 and 2101 of Title 28 U. S. C.

QUESTION PRESENTED

Assignees for the benefit of creditors allegedly procured an assignment from a bankrupt and thereafter transferred the property assigned more than four months prior to bankruptcy, all pursuant to an alleged plan to defraud the bankrupt.

The question presented is whether the transfers made by the assignees pursuant to such fraud practiced on the bankrupt constitute transfers "suffered by" the bankrupt in fraud of creditors within the reach of Section 70e of the National Bankruptcy Act as amended.

STATUTES INVOLVED

Section 70e of the National Bankruptcy Act as amended by the Act of June 22, 1938, commonly known as the Chandler Act (c. 575, Sec. 70e, 52 Stat. 882, 11 U. S. C. 1946 ed., Sec. 110e), provides:

> "e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act, which, under any Federal or State law applicable thereto, is fraudulent as against or voidable for

any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

"(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whomever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

"(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction." 11 U. S. C. 1946 ed., Sec. 110e.

Prior to the amendment by the Chandler Act, Section 70e of the 1898 Bankruptcy Act (c. 541, Sec. 70e, 30 Stat. 566, as amended by Act of February 5, 1903, c. 487, Sec. 16, 32 Stat. 800, 11 U. S. C. 1934 ed., Sec. 110e), provided:

"The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may recover the property so transferred, or its value, from the person to whom it was transferred, unless he was a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value. For the purpose of such recovery any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction." 11 U. S. C. 1934 ed., Sec. 110e.

STATEMENT OF THE CASE

The essential facts as alleged in the amended complaint may be briefly stated. On June 2, 1947, the defendants, Louis Sachs, Joseph L. Nathanson and Carl K. Lifson, procured the bankrupt, one Hyman Cohen, to execute a trust deed of general assignment appointing them trustees of the bankrupt's non-exempt property, upon the fraudulent representations that they would operate the business of the bankrupt in a normal manner, pay all pressing claims of non-assenting creditors, and treat all creditors on an equal basis (R. 4). In fact, they then intended to transfer the trust property to their co-defendants and to other persons, pursuant to a plan and conspiracy of all the co-defendants to defraud the bankrupt (R. 4-5). Pursuant to such conspiracy and with the intent on the part of the defendant trustees to hinder, delay and defraud creditors (R. 6-7), the trustees, between the dates of June 2, 1947, and January 1, 1948, made three transfers of the trust property, two of them to their co-defendants (R. 5-6) and one to a third party (R. 6), each without a fair consideration, thereby rendering the bankrupt insolvent, in violation of the statutes of the state of Minnesota (R. 6). The bankrupt executed the trust deed "relying upon the fraudulent representations and the promises aforesaid, and without knowledge of the fraudulent concealment of said Sachs, Nathanson and Lifson aforesaid, * * *" (R. 5).

An involuntary petition in bankruptcy was filed against Cohen on April 5, 1948 (R. 1), more than ten months after the execution of the trust deed.

This action was thereafter commenced by the plaintiff as trustee in bankruptcy of Cohen to set aside each of the three transfers by the defendant trustees alleged in the amended complaint as in fraud of creditors, and to

require the defendants to deliver up the property so transferred, or, if they failed to do so within a period to be fixed by the court, to pay the sum of $157,206.64 (R. 8). No demand was made to set aside the original transfer from the bankrupt to the defendant trustees under the trust deed of June 2, 1947. As the District Court observed, "The plaintiff here relies upon the transfer from the [defendant] trustees to the other defendants as the transfer which was fraudulent as against the creditors" (R. 25).

Jurisdiction of the United States District Court in bankruptcy was sought to be invoked under Section 70e of the Bankruptcy Act as amended (R. 1). No diversity of citizenship or any other independent ground for invoking the jurisdiction of the federal courts is alleged.

Motions to dismiss for lack of jurisdiction, filed by each of the defendants (R. 17-21), were granted by the District Court (R. 22-28). The District Court pointed out that the "bankrupt Cohen was not a party to the fraudulent transactions between the common-law trustees and the defendants, and assigned his property to the trustees in good faith, according to the complaint herein" (R. 23), and concluded that transfers so made were not "transfers by" the bankrupt under Section 70e prior to the enactment of the Chandler Act in 1938 (R. 25-26), and that, although the phrase "transfer made or suffered by" the bankrupt was substituted in the 1938 amendment, the "legislative history * * * shows that the Chandler Act did not intend to change or enlarge the Court's jurisdiction or the type of transfer which might be voided" (R. 26). The District Court accordingly found it unnecessary to consider whether the complaint stated a cause of action (R. 28).

On appeal, the court below reversed. It held that there was "no need to refer to legislative history where statutory language is sensible and unambiguous" (R. 36). It further held that the word "suffered" as used in Section 70e had acquired such meaning in *Wilson v. Nelson,* 183 U. S. 191, where the phrase "suffered or permitted" as used in the definition of a "preference" constituting an act of bankruptcy, under Section 3—read in the light of its legislative history—was held to include a judgment and ensuing execution obtained pursuant to an irrevocable power of attorney (R. 36-38).

SPECIFICATION OF ERRORS TO BE URGED

1. The court below erred in holding that the transfers made by the assignees were transfers "suffered" by the bankrupt in fraud of creditors within the reach of Section 70e of the National Bankruptcy Act as amended.

2. The court below erred in failing to hold the transfers so made were not "suffered" by the bankrupt in fraud of creditors within the meaning of Section 70e of the National Bankruptcy Act as amended.

3. The court below erred in failing to hold that the transfers so made were not transfers "made" by the bankrupt in fraud of creditors within the reach of Section 70e of the National Bankruptcy Act as amended.

REASONS FOR GRANTING THE WRIT

It is common ground that under Section 23b of the Bankruptcy Act, the federal bankruptcy courts are without jurisdiction of a plenary action save those brought under Sections 60, 67 and 70 of the Act, in the absence of diversity of citizenship or other independent grounds for invoking federal jurisdiction, and that the instant case

accordingly may be brought within the jurisdiction of the District Court only if it involves a transfer within the reach of Section 70e of the Bankruptcy Act as amended. The court below, however, held that the transfers in controversy were "suffered" by the bankrupt within the meaning of Section 70e as amended.

The question thus presented is one of importance in the administration of the Bankruptcy Act, and was decided by the court below on principles probably in conflict with those heretofore established by the decisions of this Court.

1. The Question Presented Is One of Importance in the Administration of the Bankruptcy Act.

The decision below, whatever its merits, overturns the practice and settled course of decision of almost half a century. Heretofore, it had been established doctrine that property acquired from the bankrupt by a fraud practiced upon him was not within the jurisdiction of the bankruptcy court (*Park v. Cameron,* 237 U. S. 616, 618; *Harris v. First National Bank,* 216 U. S. 382, 385; *Siegel v. Municipal Capital Corp.* (C. A. 2), 102 F. (2d) 905, 907; *Waite v. Gottstein* (D. C. Wash.), 224 F. 281, 283), and this upon the ground that in actions involving a wrongful appropriation from the bankrupt "no attack is made upon a transfer by the bankrupt which would have been void as to creditors." *Harris v. First National Bank, loc. cit. supra.*

The cases cited, to be sure, were decided under Section 70e of the Bankruptcy Act before its amendment by the Chandler Act. Until the decision below, however, Section 70e as amended had been administered in accordance with such prior precedent. So far as appears from the published reports, this is the first case since the enact-

ment of the Chandler Act in which the bankruptcy court's jurisdiction has been invoked to recover property acquired by fraud practiced on the bankrupt. The explanation, we think it fair to say, is not an unprecedented rectitude in the conduct of business affairs since 1938, but the settled understanding of the profession that the jurisdiction of the federal bankruptcy courts under Section 70e was unaffected by the amendments of 1938.

Prior to the amendment, transfers voidable under state law were covered by two sections, 67e and 70e. The former contained a four-months' limitation, the latter did not. Because lawyers "not sufficiently familiar with the Act and the decisions under 67e and 70e" had "been misled by the limitation of four months in Section 67e" the provisions of the two sections were amended so as to merge in "the more inclusive and wider scope of the existing 70e" all the provisions governing transfers voidable under state law. H. Rept. No. 1409, 75th Cong., 1st Sess., pp. 32, 35; S. Rept. No. 1916, 75th Cong., 3rd Sess., p. 17.

Nowhere in the committee reports, nor in the authoritative comments in Weinstein, *The Bankruptcy Law of 1938,* pp. 162-163, whose author is generally recognized as the "draftsman" of the Chandler Act (see *Emil v. Hanley,* 318 U. S. 515, 522), nor in any of the vast literature on the effect of the Chandler Act, is there even a hint that the amendment of Section 70e was intended for any other purpose or to enlarge the jurisdiction of the federal bankruptcy courts.[1] To the contrary, the learned authors

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[1]See Weinstein, **The Bankruptcy Law of 1938** (1938) 162-163; Hanna and McLaughlin, **The Bankruptcy Act of 1898 as Amended Including the Chandler Act of 1938** (1938) 80-81; Mulder and Forman (American Law Institute), **Bankruptcy and Arrangement Proceedings** (1951) 76-79; James A. McLaughlin, **Aspects of the Chandler Bill to Amend the Bankruptcy Act** (April, 1937), 4 U. of Chi. L. Rev. 384-388; Walter Chandler,

of the leading text on bankruptcy assume on the authority of the prior decisions that "the bankruptcy court will not have jurisdiction of plenary actions against wrongdoers who have, without the consent of the bankrupt, appropriated or misapplied the property of the estate prior to bankruptcy." 2 *Collier on Bankruptcy* (14th Ed.), Section 23.15, pp. 581-582, citing *Park v. Cameron, supra, Siegel v. Municipal Capital Corp., supra, Waite v. Gottstein, supra.*

This is not, of course, the occasion to consider whether the result reached by the court below is required by the unequivocal language of the statute or whether the decision below may otherwise be supported on the merits. We respectfully suggest, however, that where as here "Congress was not writing on a clean slate" (*Emil v. Hanley, supra,* page 521) such a "major change" (*id.* p. 521) in the jurisdiction of the bankruptcy courts

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The Revised Bankruptcy Act of 1938 (Nov., 1938), 24 A. B. A. Jour. 882; Mitchell S. Dvoret, **Bankruptcy Under the Chandler Act: Analysis** (Mar., 1939), 27 Georgetown L. R. 609-610; G. W. Parker, **The Chandler Act as to Changes Effected** (Jan., 1940), 45 Com. L. J. 469; L. H. David, **Analysis of the New Chandler Act** (June and July, 1938), Al Corp. Reorg. Combined with Am. Bank. Rev. 501-510; **Liens and Fraudulent Transfers Under the Chandler Act** (Jan., 1939), 87 U. of Pa. L. Rev. 324-327; D. M. Oldham, **Chandler Amendment to the National Bankruptcy Act** (April, 1939), 17 Tex. L. Rev. 329-334; D. M. Oldham, **Plenary, Summary and Concurrent Jurisdiction Under the Chandler Act** (Oct., 1940), 15 J. N. A. Ref. Bank. 42-44; S. M. Greenbaum, **Plenary Summary and Concurrent Jurisdiction Under the Bankruptcy Act** (Oct. and Nov., 1942), 9 J. B. A. Dist. Col. 463, 499, **passim**; Paul H. King, **Pivotal Points of the Chandler Act** (Sept., 1938), 43 Com. L. J. 326, **passim**; E. B. Levy, **The Chandler Act for Creditors** (Dec., 1938), 43 Com. L. J. 464, **passim**; Vincent J. Leibell, Jr., **The Chandler Act—Its Effect Upon the Law of Bankruptcy** (Nov., 1940), 9 Fordham L. Rev. 380, **passim**; M. A. Russell, **The Chandler Act** (Sept., 1939), 5 John Marshall L. Q. 131, **passim**; R. J. Kenney, **Creditors Rights Under the Bankruptcy Act** (1949), 33 Marq. L. Rev. 135, **passim**; S. F. Hollins, **The Chandler Act** (Jan., 1939), 14 Calif. S. B. J. 1, **passim.**

should not be sanctioned without the prior consideration of this Court.[2]

2. The Decision Below Is Based on Principles in Probable Conflict With Those Established by This Court.

The decision below, in holding that the legislative history of Section 70e as amended may not be considered, is in conflict with principles established by this Court, principles which in the case of the Chandler Act are essential to the preservation of the basic scheme of the Act.

The Chandler Act was the culmination of congressional consideration of proposed revisions of the Bankruptcy Laws extending over a period of almost eight years.[3] Following the so-called Donovan Report in 1931,[4] a comprehensive report recommending sweeping changes was prepared in 1931 under the direction of the then Solicitor General Thatcher. See *Report of the Attorney General on Bankruptcy Law and Practice,* S. Doc. No. 65, 72nd Cong., 1st Sess., 1932. These recommenda-

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[2]While, as stated, this is not the place to discuss the merits, it may be noted in passing that the decision below, to say the least, is not plainly correct. The decision in **Wilson v. Nelson,** 33 U. S. 191, defining the phrase "suffered" as used in the definition of a "preference" constituting an act of bankruptcy under Sec. 3 of the 1898 Act, was itself based on the legislative history, which showed that the term as used in 1898 Act was intended to have a broader meaning than when previously used in the 1867 Act, where it had been limited to preferences made with the consent or participation of the bankrupt. The court below did not find it necessary to consider other familiar precedents applying the term "suffered" in the more restrictive sense in other contexts. See **Fox v. Summit King Mines** (C. A. 9), 143 F. (2d) 926, 932; **Gregory v. United States,** 17 Blatchf. 325, 331; **Armstrong's Administrator v. Sumne & Ratterman Co.,** 211 Ky. 750, 755, 278 S. W. 111, 113.

[3]For a full exposition of the historical and legislative background of the Chandler Act see Mitchell S. Dvoret, **Bankruptcy Under the Chandler Act: Background** (Dec., 1938), 27 Georgetown L. Rev. 194-207.

[4]William J. Donovan, **Administration of Bankrupt Estates** (1931).

tions were embodied in the Hastings-Michener Bill (H. R. 9968, S. 3866, 72nd Cong., 1st Sess.), designed to bring about a complete revision of the existing bankruptcy system, including the establishment of a central bureau for the administration of the bankruptcy laws. H. Rept. 1409, 75th Cong., 1st Sess., p. 2.

Dissatisfaction with a centralized administration, and the reluctance to discard "the interpretation of the act through court decisions extending over a period of more than 30 years" (H. Rept. No. 1409, 75th Cong., 1st Sess., p. 2), led to the rejection of the Hastings-Michener Bill and establishment of the National Bankruptcy Conference to consider revisions within the existing framework of the bankruptcy laws. *Ib.*

The Conference was composed, as the House Judiciary Committee stated, of "a nation-wide group of experienced members of such organizations as the American Bar Association, the Commercial Law League of America, the National Association of Credit Men, the National Association of Referees in Bankruptcy, law school professors, authors of law textbooks, and others, all men schooled in bankruptcy law and procedure," which "for more than five years," was "engaged in the preparation of proposed amendments, in cooperation with the House Committee on the Judiciary." H. Rept. No. 1409, *supra,* page 2.

As the House Judiciary Committee further observed, "extensive hearings were held by the House Judiciary Committees of the 74th and 75th Congresses," and "many excellent suggestions from the National Bankruptcy Conference, from bar associations and from outstanding attorneys in all parts of the country" were considered, and "tentative drafts and committee prints"

were "published and widely distributed for the purpose of obtaining suggestions and criticisms." *Id.* p. 3.

Before enactment the amendments were carefully considered and explained in detailed congressional committee reports and informed comments nowise lacking in "candor or accuracy." Cf. *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U. S. 384, 396, per Jackson, J.

The record of such extensive and authoritative deliberations cannot be ignored consistently with the decisions of this Court. In *Ex parte Collett*, 337 U. S. 55, 58, and *United States v. National City Lines*, 337 U. S. 78, 81, this Court considered that in like circumstances, the revisor's notes were "obviously authoritative" in construing the revised Judicial Code, even in the interpretation of "unmistakable" and "unequivocal" statutory language. *United States v. National City Lines, supra*, at 81, 82, 84; *Ex parte Collett, loc. cit. supra.*

Precisely the same canon of construction was followed in *Emil v. Hanley*, 318 U. S. 515, in interpreting one of the 1938 amendments added by the Chandler Act. In the *Hanley* case, the Court held that Section 2(a)(21) did not extend to a receiver appointed within four months of bankruptcy as an incident to enforcement of a lien surviving bankruptcy. Although the section "read literally would call for a different result" (*id.* p. 520), the Court pointed out that such result would overturn the settled prior practice (*id.* p. 520), that Congress "was not writing on a clean slate," and that the explanation of the "House Judiciary Committee in its report" was "as plain an indication as could be" that no such result was intended. *Id.* pp. 520, 521. The Court added, "We cannot help but think that if Congress had set out to make such a major change, some clear and unambiguous indication of that purpose would appear. But we can find none." (*Id.* p. 521.)

The decision of the court below in failing to apply these principles threatens to undermine the basic scheme of the Chandler Act. The court below not only disregarded the legislative history of Section 70e but construed the Act in general as though it were to be "read literally" regardless of any contrary intention of Congress manifested in the committee reports. Cf. *Emil v. Hanley,* 318 U. S. 515, 520.

Thus, while expressly finding it unnecessary to consider whether the transfers in controversy were "made" as well as "suffered" by the bankrupt, the court below observed that its conclusion was "in harmony" with the definition of "transfer" in Section 1(30), which includes "every" mode of disposing of property "voluntarily" or "involuntarily," and also with Section 70a(8) which the court below thought "indicates that an assignee for the benefit of creditors is to be regarded merely as the agent of the bankrupt for the purpose of the Bankrupt Act" (R. 39).

In its observations on Sections 1(30) and 70a(8), the court below ignored the committee reports containing "as plain an indication as could be" of a contrary intention. Cf. *Emil v. Hanley, loc. cit., supra.* The report of the House Judiciary Committee on the Chandler Act makes clear that the definition of the word "transfer" in Section 1(30) was intended not to give uniformity of meaning to that word wherever used in the Act, but merely to permit uniformity of terminology while leaving the precise meaning to be determined according to the varying contexts of the several sections.[5] Section

[5]H. Rept. No. 1409, 75th Cong., 1st Sess., p. 5, referring to Sec. 1 (30) states: " 'Transfer.'—Clause (30): The reason for the changes in this definition is that section 60, dealing with preferences, speaks of transfers and judgments; section 67, dealing with liens and fraudulent transfers, speaks of liens, conveyances, transfers, assignments, encumbrances,

70a(8) likewise was intended as merely "declaratory of the law" (H. Rept. No. 1409, 75th Cong., 1st Sess., p. 34; see also Weinstein, *The Bankruptcy Law of 1938*, p. 158), under which the assignee of an assignment for the benefit of creditors made, as here, more than four months prior to bankruptcy, was universally deemed to hold adversely to the bankrupt and not as his agent in a technical sense. *Mayer v. Hellman*, 1 Otto 496; see 4 *Collier on Bankruptcy* (14th Ed.), Sec. 70.38, p. 1194; 1 *Collier on Bankruptcy* (14th Ed.), Sec. 2.78, p. 349.

If the decision below is permitted to stand, it will establish a rule for the Eighth Circuit—and a precedent for all others—that Title I of the Chandler Act should be construed as though Congress were writing "on a clean slate" and thereby entirely divorce its administration from "the interpretation of the act through court decisions extending over a period of more than 30 years" (H. Rept. No. 1409, 75th Cong., 1st Sess., p. 2), contrary to the avowed intention of Congress.

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levies, judgments, and attachments; and section 70(e), dealing with the avoidance by the trustee of transfers, uses merely the term 'transfer.' In order to achieve uniformity, the revised terminology of these sections, wherever possible, is restricted to the latter term. It therefore becomes necessary to expand the phraseology of this definition, in order to make certain that it shall include the full scope of all the terms presently employed in the sections cited."

Even before the amendment the word "transfer" was broad enough to include any transfer, voluntary or involuntary, where the context so required. Prior to the 1938 amendments, the word "transfer" was construed by the courts "in its most comprehensive sense to include every method by which property can pass and by which the result forbidden by the statutes may be brought about," (**Pirie v. Chicago Title & Trust Co.**, 182 U. S. 438, 444), and such is the reach of the term as now amended. **Crenshaw v. McKinley** (C. A. 2), 116 F. (2d) 877, 879.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

MELVIN H. SIEGEL,
1036 Andrus Building,
Minneapolis, Minnesota,
Counsel for Petitioners.

Of Counsel:

LEONARD, STREET & DEINARD,
1036 Andrus Building,
Minneapolis, Minnesota.